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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-324

THOMAS G. McCREA, Judge, Superior Court of Snohomish County, State of Washington,

Petitioner

v.

SAM SPERRY and DEE NORTON,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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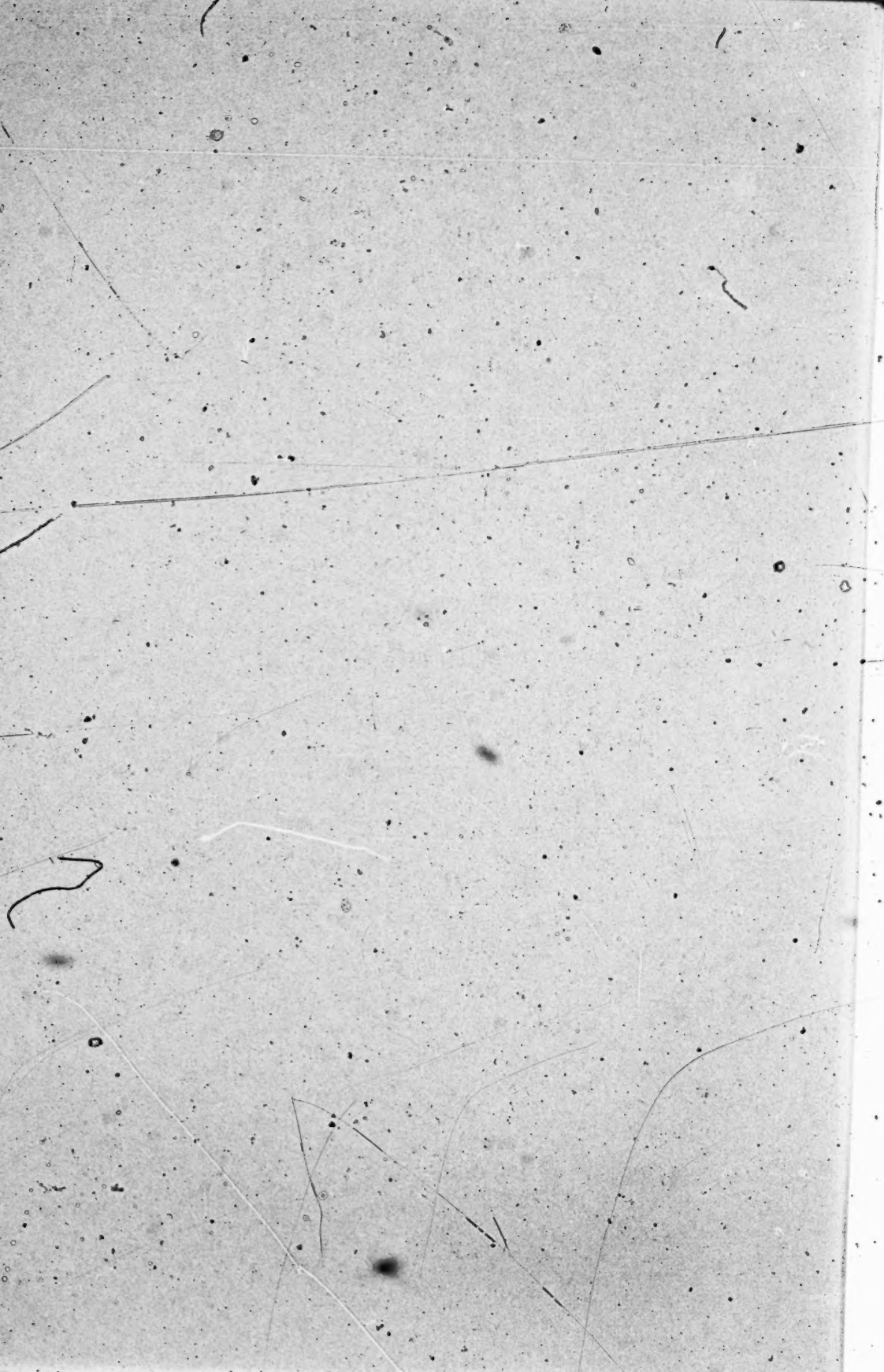

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SAM SPERRY and DEE NORTON,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Washington entered in the above-entitled case on April 8, 1971 and which became final on June 4, 1971.

OPINION BELOW

The opinion of the Washington State Supreme Court, reproduced in Appendix A hereto, is reported in 79 Wash. Dec.2d 69,483 P.2d 608 (1971).

JURISDICTION

The opinion of the court below was filed April 8, 1971 (Appendix A, *infra*). In Washington, no separate judgment is entered. A timely petition for rehearing was filed with the Washington State Supreme Court, and the petition for rehearing was denied on June 4, 1971. (Appendix B) Jurisdiction of this court is invoked under 28 U.S.C., §1257(3).

QUESTIONS PRESENTED

1. Does the first amendment to the United States Constitution render a trial judge powerless during the course of a criminal trial, to limit reporting of events which occur in the courtroom, but outside the presence of the jury?
2. Do the rights of a criminal defendant to a trial by an impartial jury and under due process of law permit the limitation during trial of news reporting of events which occur outside the presence of the jury?
3. May members of the press, made subject to an order limiting reporting of events occurring during trial, violate such order without first attacking it directly, and thereafter raise constitutional arguments against the order only when cited for contempt?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are those of the first amendment to the United States Constitution, providing:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

of the sixth amendment to the United States Constitution, providing:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the

crime shall have been committed. . . .

and of the fourteenth amendment to the United States Constitution, providing:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

The state statutes empowering the trial judge to hold persons in contempt are R.C.W. 7.20.010, providing:

> The following acts or ommissions, in respect to a court of justice or proceedings therein, are deemed to be contempts of court: . . . (5) Disobedience of any lawful judgment, decree, order or process of the court

and R.C.W. 7.20.020, providing:

> Every court of justice, and every judicial officer has power to punish contempt by fine or imprisonment, or both . . . .

The court order which respondents were found to have violated is set out in Appendix C hereto, and limited the reporting of certain portions of a first degree murder trial then in progress.

STATEMENT

Petitioner Thomas B. McCrea is a judge of the Superior Court of Snohomish County, State of Washington. Commencing October 13, 1970, he presided over the trial of Thomas Eugene Braun and Leonard Eugene Maine, who were jointly charged with murder, kidnaping, robbery and grand larceny. The trial extended for a period of three months, resulting in verdicts of guilt as to both defendants on all counts, and in the jury's imposition of the death penalty upon Braun.

The crimes with which the defendants were charged were alleged to have occured on the 19th day of August, 1967. The defendants were arrested in California on the 22nd day of August, 1967, and were subsequently tried and convicted there on murder and other charges in the fall of 1968. Substantial local news media coverage in the state of Washington was given to that trial. Early in 1970 the defendants were brought from

penal institutions in California for trial in Snohomish County. News coverage was given the pending trial. Because of the notoriety of the case, and with the agreement of defendants, their counsel and the prosecution, a comprehensive order was entered by petitioner regulating courtroom procedures, photographing procedures and news media coverage of the trial. (Appendix C, *infra*) The order was entered on the 8th day of October, 1970. Copies were provided for representatives of the various media; among them the respondents Sperry and Norton, reporters for The Seattle Times newspaper.

Jury selection in the criminal case began on the 13th day of October, 1970, and the state began presentation of its case on the 26th day of October.

Defense counsel, the defendants and the state stipulated in writing that the jury, when selected and sworn, could separate and would not be sequestered during trial.

On October 28, 1970, a hearing was held in the absence of the jury, to establish whether there had been probable cause to arrest the defendants in California, and to determine what portion of the testimony the jury would hear. Certain portions were ruled inadmissible and ordered not to be presented to the jury. These included references to other crimes, including murder, committed by defendants in California. At the time of this hearing, the courtroom was open to the public.

On the following day, October 29, an article covering the probable cause hearing and authored by respondents Sperry and Norton appeared in The Seattle Times. (Appendix E. *infra*) The article detailed the testimony of the several witnesses, including that held inadmissible and not to be presented to the jury.

After Judge McCrea was advised of the publication of the article, a contempt hearing was set for Sperry and Norton for the 2nd day of November, 1970. After Sperry and Norton sought relief in the State Supreme Court, the contempt hearing was held on the 2nd day of November, 1970, and the two were adjudged in contempt. The Order of Contempt, together with Findings of Fact and Conclusions of Law supporting the Order,

were entered on the 6th day of November, 1970. (Appendix D, *infra*) Sperry and Norton were each fined $50.00.

The portion of petitioner's order drawn into question by the contempt citation read:

> 2. No Court proceedings shall be reported upon or disseminated to the public by any form of news media, including, but not limited to newspaper, magazine, radio and television coverage, except those proceedings occurring in open Court in the presence of the Judge, jury, court reporter, defendants and counsel for all parties. No report shall be made by such news media in any event of matters of testimony ruled inadmissible or stricken by the trial judge at the time of the offer of the matter or testimony.
>
> The requirement that all parties be present shall not apply to reports of matters of non-testimonial or non-evidentiary character, such as description of Courtroom setting and the like, and general descriptions of re-schedulings and the court procedure. The limitations on matters to be reported previously noted shall not apply after completion of trial and dismissal of the jury.
>
> All counsel, news media, reporters, announcers and judicial personnel, including the Judge, shall be governed by the rules and spirits of the Statement of Principles of the Bench-Bar-Press of the State of Washington promulgated and dated the 26th day of March, 1966.

At the contempt hearing, counsel stipulated to the facts surrounding publication of the article in question. Counsel for Sperry and Norton argued that the limitation imposed by the order constituted a violation of the right of freedom of the press as guaranteed by the first amendment to the United States Constitution, and that consequently the order was invalid in that respect and that Sperry and Norton could not therefore be found in contempt. Petitioner determined his order was constitutionally permissible, as well as necessary to insure a fair trial for the defendants (Appendix D.), and thereafter held Sperry

and Norton were in contempt for publication of the article.

Sperry and Norton then appealed the finding of contempt to the Washington State Supreme Court. That court concluded the order of October 8, 1970 was void because it violated appellants' first amendment rights, and thus reversed the judgment of contempt. The court initially concluded that provisions of the state constitution dealing with the administration of justice (Washington State Constitution, Art.1, §10) brought into effect the state (Washington State Constitution, Art.1, §5) and federal constitutional guarantees of freedom of speech and press. Thereafter the court discussed briefly the United States Supreme Court cases dealing with prior restrictions on reporting, concluded that such restrictions come with a presumption of consitutional invalidity, and determined that while the trial judge's efforts were to secure a fair and impartial trial, that there was only a "mere possibility of prejudicial matter reaching a juror outside the courtroom", and that this possibility was less important than freedom of expression.

The Washington court declined the state's suggestion that a genuine conflict existed between two equally significant constitutional guarantees, which conflict could only be resolved by drawing a balance between the two. The court therefore refused to consider whether the limitations imposed upon the press were minimal or of substantial effect, and also failed to even mention the most recent treatment of the conflict by the United States Supreme Court. The court likewise omitted any reference to the constitutional implications, raised by the state, of forcing an unwilling defendant to accept a sequestered jury. The opinion also implies that actual prejudice must be shown before improper public disclosures would allow reversal of a criminal conviction, contrary to the state's assertion that even a probability of unfairness can be such a failure of due process as to require a new trial. Finally, the court rejected the state's argument that the appeal from the judgment of contempt was an impermissible collateral attack, not timely raising the constitutional issues.

REASONS FOR GRANTING THE WRIT

This petition raises substantial and significant questions concerning the extent to which a judge presiding over the jury trial of a capital case may, in order to protect the defendants' sixth and fourteenth amendment rights to a fair and impartial jury, and fair trial, temporarily limit dissemination by the public news media of testimony and occurrences in open court which the jury, however, will not be permitted to hear. This court has not previously passed on this question, but it has in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), levied upon trial judges in the several states a duty to govern the conduct of news media in criminal trials so as to insure protection of these rights. Petitioner here fashioned an order designed to implement the dictates of *Sheppard*. The Supreme Court of the State of Washington, believing such efforts prohibited absolutely by the first amendment, found petitioner's order void. The issue of the conflict between free press and fair trial, and the relative weight to be accorded each, is thus squarely raised. Review by this court is appropriate and necessary.

1. THE FIRST AMENDMENT GUARANTEE OF FREE PRESS IS NOT ABSOLUTE, AND DOES NOT PROHIBIT LIMITATION OF THE RIGHT TO PUBLISH, WHEN NECESSARY TO EFFECTUATE OTHER CONSTITUTIONAL GUARANTEES.

The state court's reversal of the contempt, upon which judgment this petition is predicated, commences:

> "[F]ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." Justice Black, *Bridges v. California*, 314 U.S. 252, 260, 86 L.Ed.192, 62 S.Ct. 190,159 A.L.R. 1346 (1941). Because the trial court here improperly made a choice between the two rights, we reverse the convictions for contempt of court entered

against the appellants.

It is this foundational assumption that there must be a choice, rather than a balancing of equally important constitutional guarantees, which renders the state court decision invalid and renders hearing by this court imperative. If this decision and others like it stand unchallenged, the directives set out in *Sheppard v. Maxwell*, 384 U.S. 333 (1966) will be for naught.

Petitioner submits the trial court could constitutionally prohibit the news media from publishing reports of testimony given out of the presence of the jury *and* held inadmissible. Although the quoted portion of the original order is broader in scope, respondents agreed in the State Supreme Court that the narrower reading does not alter the basic constitutional issue raised by the original order. (Respondents Opening Brief, 20) Moreover, the questioned newspaper article contained reporting of testimony made improper even under the amended order.

The State Supreme Court, in its cursory reference to controlling federal decisions, relied primarily on the statements in *Craig v. Harney*, 331 U.S. 367 (1947), and *Estes v. Texas*, 381 U.S. 532 (1965). See also *Bridges v. California*, 314 U.S. 252 (1941) and *Pennekamp v. Florida*, 328 U.S. 331 (1946). These cases however, must be viewed in light of *Sheppard v. Maxwell*, 384 U.S. 333 (1966), which marks a re-evaluation of the boundaries of press freedom, and develops a co-extensive and sometimes conflicting view of the rights of a criminal defendant to a trial untainted by outside publicity, and of the trial court's duty to safeguard and effectuate those rights. *Sheppard* is not mentioned in the state court's majority opinion.

Sheppard is also particularly significant in that it specifically considered the issue which resulted in respondents being held in contempt - the publication of inadmissible evidence:

> The prosecution repeatedly made evidence available to the news media which was never offered in the trial. Much of the "evidence" disseminated in this fashion was clearly inadmissible. ***The exclusion of such evidence in court is rendered meaningless when news media made it available to the public.***

(Emphasis added)

The thrust of *Sheppard* is found in the following strongly worded language:

> From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.

It is also significant to find that *Sheppard* directly met the effects of *Bridges, supra, Pennekamp, supra* and *Craig, supra.* After noting the principles for which they stood, Justice Clark said:

> But the Court has also pointed out that "[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." Bridges v. State of California, supra, 314 U.S. at 271, 62 S.Ct. at 197. And the Court has insisted that no one be punished for a crime without "a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power." Chambers v. State of Florida, 309 U.S. 227, 23-237, 60 S.Ct. 1029, 1037, 90 L.Ed. 1295 (1946). But it must not be allowed to divert the trial from the "very purpose of a court system . . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures." Cox v. State of Louisiana, 379 U.S. 559, 583, 85 S.Ct. 466, 471, 13 L.Ed. 2d 487 (1965) (Black, J., Dissenting.

It is because of the pervasive thrust of the entire opinion

that one is lead to the conclusion that free press and fair trial represent co-extensive and fundamental rights, neither of which must be permitted to overbear the other. This being so, the state court erred in its belief that the one must be "chosen" over the other. That error should now be considered by this court.

2. THE TRIAL JUDGE'S ORDER RESPECTING NEWS MEDIA WAS A CONSTITUTIONALLY PERMISSIBLE PROTECTION OF THE RIGHT OF CRIMINAL DEFENDANTS TO A FAIR TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

Assuming, as *Sheppard* teaches, that first amendment rights are not automatically transcendent over other constitutional guarantees, the question becomes whether the limitations in this case were sufficiently narrow in scope, whether they effectuated their stated purposes, and whether the effect on competing rights was sufficiently minimal to validate their imposition. If the restrictions were over-broad, the order of October 8, 1970 would be void. If, however, the restrictions were reasonably adapted to insure fair trial, with minimal interference with free press, then they ought to stand.

What are the conflicting interests of free press and fair trial between which must be made a rational accommodation? In *Oxnard Publishing Co. v. Superior Court*, 261 Cal. App.2d 505, 68 Cal.Rptr. 83 (1968), the court held, upon application of a newspaper publisher, that holding approximately one-half of the trial in exclusion of the public was improper, for despite the defendant's waiver of public trial, the other interests were not protected:

> In criminal trials these interests, as we see them, are basically three: (1) the interest of the accused, and his connections, in securing a fair trial; (2) the interest of the victim, and his connections, in obtaining justice for a particular wrong; and (3) the

> interest of the general public in public tranquility, in honest government, and in effective institutions. While these interests may parallel one another in a given case, more often they face in divergent directions. Each interest is entitled to recognition and consideration in each case, and no one of them can be permitted to swallow up the other two.

And how were these interests served in this trial? Here the public *per se* was never excluded from the courtroom. Only the publication by the media of certain limited elements of the trial was prohibited - and this only for the period of the trial itself. Bearing in mind the benefit gained by public observation of the trial itself, it seems at least very difficult to suggest that these benefits are diminished or diluted, or that the desirable effects of public knowledge of a trial are materially affected by application of the narrowly drawn order in question.

Next, the interest of the victim must be considered. Since the victim or his friends and relatives were never to be excluded, and since there was no effect on the ability of the jury to properly decide the issues before it, the victim's interest is in no way damaged or affected.

Turning to the rights of the defendants, they unarguably were benefited. The possibility that jurors would encounter prejudicial material in the media was eliminated. The jury was not sequestered. Nor did the partial waiver of public reporting of their trial, made by these defendants with the advice of counsel, jeopardize their fair handling by the courts.

Again, it should be born in mind that the limitation on the media was not designed to put a better or different face on the defendants or the prosecution, or to obscure the workings of the court. There was a minimum actual limitation imposed upon the press. The sole motivation was to protect the jury from information which they admittedly should not receive. If this purpose was accomplished, and if no measurable harm, present or future, was done to the competing interests previously described, then petitioner's order ought to be found constitutionally acceptable.

The issues upon which petitioner seeks review have not lacked comment and analysis by legal scholars, special interest groups, and concerned judiciary. See "Report of the Committee on the Operation of the Jury System on the 'Free Press - Fair Trial' Issue", 45 F.R.D. 391; American Bar Association's Advisory Committee's Report on Fair Trial and Free Press: Reardon Report; "Freedom of the Press and Fair Trial": Medina Report; Special Committee, Board of American Newspaper Publisher's Association, "Free Press and Fair Trial". Although in agreement that a conflict exists, widely varying solutions are postulated.

As stated in *Mares v. United States*, 383 F.2d 805 (10th Cir. 1967):

> The problem presented is incapable of a satisfactory solution. Media of publicity have the right to report what happens in open court. An accused has a right to a trial by an impartial jury on evidence which is legally admissible. The public has the right to demand and expect "fair trials designed to end in just judgments." These rights must be accommodated in the best possible manner.

Solutions to constitutional conflicts, however, must be fashioned, and that fashioned by petitioner in the order of October 8 was calculated to accommodate the conflicting interests in the most acceptable manner. Such accommodation, however, now requires validation by this court.

3. THE ISSUE OF THE RIGHT TO IMPOSE LIMITATIONS ON NEWS MEDIA COVERAGE OF TRIALS TO ENSURE FAIR TRIAL IS FAIRLY BEFORE THIS COURT AND CALLS FOR PRESENT DETERMINATION.

It is apparent that no trial judge in the state of Washington will feel permitted to impose limiting orders of any sort upon the news media during criminal trials, in light of the decision of the State Supreme Court in this case (Appendix A). Likewise, the decisions in other jurisdictions have foreclosed trial judges

in those states from formulating controls over news media which seek to strike a balance between free press and fair trial; *Phoenix Newspapers, Inc. v. Superior Court*, 101 Ariz.257, 418 P.2d 594 (1966); *People v. Pratt*, 278 NYS 2d 89 (A.D. 1967); *Azbill v. Fisher*, 442 P.2d 916 (Nevada 1968). Although controls of the sort attempted by these trial judges are in furtherance of the philosophy of balance directed in *Sheppard*, the state appellate courts continue to see the first amendment protection as nearly absolute.

Given the trend of these decisions, it is reasonable to assume that fewer trial judges will be willing to attempt regulation of news media to ensure fair and impartial trial. There will be fewer appellate decisions, and fewer opportunities to present these issues to this court. The experimentation and attempts to draw reasonable lines between the genuinely conflicting interests of the news media and the criminal defendant will cease, only to be revived in a case of unhappy excess such as *Sheppard* or *Estes*.

Secondly, the posture of this particular case presents a narrow issue, and is unencumbered with the potential result of the retrial of a serious but independent criminal charge. Thus in *Sheppard* and *Estes*, the articulation of the requirements of media limitation also compelled reversal of a criminal conviction with subsequent delay and costly retrial. Here the entire focus has been since the commencement of the proceedings the constitutional conflict between fair trial and free press, and the proper resolution thereto. Thus, the issue is ripe for determination, and the case appropriately presents the issue for resolution.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Washington.

Respectfully submitted,

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